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type of situation wherein Illinois banks may find the amendment to be of considerable aid.[41]

QUASI-CONTRACTS

While nothing of significance has been said about the law of sales and suretyship, the essential equity which underlies the enforcement of contracts implied in law receives further illustration by reason of the holding in *Nelson* v. *Fricke*.[42] Plaintiff therein, having paid the price for, as well as having expended funds on the improvement of, a vacant lot, discovered that the vendor would not perform his oral promise to convey the premises. Rather than take a chance at securing specific performance on the contract, plaintiff elected to sue at law, as in general assumpsit, for recovery of the sums paid and expended. Defendant denied making any agreement to convey but particularly relied on the defense of the statute of frauds as a bar to suit. The court, acknowledging that such defense might have been applicable had the suit been based on the oral contract, affirmed a judgment for plaintiff because to do otherwise would have resulted in allowing the vendor to retain both the land and the money paid therefor, a most unconscionable result. While not new in principle,[43] the case strengthens the view that implied promises are not difficult to project when inequitable results would otherwise follow.

III. CIVIL PRACTICE AND PROCEDURE

AVAILABILITY OF REMEDIES

Intimately connected with the problem of whether a particular remedy is available to a given plaintiff is the correlative problem of whether the selected court will be legally able to award the desired relief which, in turn, leads to questions con-

41 There is some occasion to think that the amendment was brought about by reason of the problem posed in the case of Rock Finance Co. v. Central Nat. Bank of Sterling, 339 Ill. App. 319, 89 N. E. (2d) 828 (1950), not in the period of this survey. The decision therein was not released until after the amendment became effective but it parallels the thought expressed in the amended statute.

42 335 Ill. App. 273, 81 N. E. (2d) 763 (1948).

43 Falls v. Visser, 250 Ill. App. 481 (1928).

cerning the presence or absence of jurisdiction. Nothing has been said in the past year concerning the power of Illinois courts to exercise their jurisdiction as that term relates to their ability to hear and determine particular categories of proceedings. Some points have been made, however, concerning the acquisition of jurisdiction over the parties to the litigation.

Personal jurisdiction over a defendant in an *in personam* action is usually gained by personal service of process, although statutory substitutes do exist.[1] Effective personal service is had when the constituted official appears in the presence of the defendant and either delivers the summons to him or leaves the same with him, the elements of reading the summons or of informing the defendant of its contents no longer being necessary. A query arose in *Hatmaker* v. *Hatmaker*,[2] upon motion to quash the service of summons, as to whether service was sufficient if the sheriff merely slipped the summons under a locked door which barred his access to the room when he had adequate reason to believe the defendant was within and had refused to open the door in order to prevent service. The trial court held the service insufficient but the Appellate Court for the First District reversed, absent any guiding precedent in Illinois, not simply because the defendant could be served in that fashion but more nearly because (1) the defendant appeared to have acquiesced in the manner of service by reason of his remark that it was "all right" when told of the sheriff's contemplated action of slipping the summons beneath the door, and (2) the defendant had apparently taken up and read the summons so served, witness his appearance and motion to quash the service. The latter would seem to be the weaker reason for it might suggest that, no matter how the knowledge is conveyed, it is the presence of knowledge that a suit is pending that is sufficient to confer juris-

[1] See Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 137. Authority for the use of constructive service by publication in civil actions affecting status or property has been enlarged, by Laws 1949, p. 1191, S. B. 237, Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 138, so as to permit the use thereof in actions "to obtain the specific performance, reformation or rescission of a contract for the conveyance of land" where the defendant is a non-resident or personal service is otherwise unobtainable.

[2] 337 Ill. App. 175, 85 N. E. (2d) 345 (1949).

diction, a fact absolutely contrary to law.[3] There is no doubt, however, that an acquiesence in the manner of service will be sufficient to cure what would otherwise be a defect in the acquisition of jurisdiction.

Prior to 1949, the Illinois Motor Vehicles Act permitted the use of substituted service on the Secretary of State, as agent, only in cases where the defendant was a non-resident at the time of the accident.[4] The affidavit of compliance to support such service, according to the holding in *Rompza* v. *Lucas*,[5] must be so worded as to show that the defendant was a non-resident at the time of the accident. A default judgment there rendered on an affidavit reciting that the defendant "is a non-resident of this state" was ordered vacated on the ground that the affidavit spoke only as to conditions existing at the time of making, hence failed to show full compliance with the law then in force. Affidavits made hereafter should, to avoid all possible question, be worded to show the residence of the defendant both at the time of the accident and at the time of service. The amended statute still omits any requirement that a receipt by defendant showing delivery to him of the registered mail notice should be an essential prerequisite to the acquisition of jurisdiction,[6] but any harm from that omission is perhaps obviated by liberal provisions for the opening of the default judgment and granting leave to defend.

Evidence of the acquisition of that type of jurisdiction necessary to support a judgment *in personam* should appear in the record, particularly in default cases. That evidence usually takes the form of a return on the summons showing the manner of service, which return is then authenticated by the signature of

3 Laney v. Garbee, 105 Mo. 355, 16 S. W. 831, 24 Am. St. Rep. 391 (1891).

4 See Carlson v. District Court, 116 Colo. 330, 180 P. (2d) 525 (1947), noted in 26 CHICAGO-KENT LAW REVIEW 159, for the view that statutory substituted service on a resident who subsequently departed from the state is invalid. The Illinois legislature, in 1949, amended the local provision to obviate this defect, as well as others, so the statute now applies to all motorists, whether resident or non-resident at the time of the accident: Laws 1949, p. 1134, H. B. 235; Ill. Rev. Stat. 1949, Vol. 2, Ch. 95½, § 23.

5 337 Ill. App. 106, 85 N. E. (2d) 467 (1949), noted in 27 CHICAGO-KENT LAW REVIEW 249.

6 See, on that point, Powell v. Knight, 74 F. Supp. 191 (1947), noted in 26 CHICAGO-KENT LAW REVIEW 275.

the sheriff. Lack of such signature on the return was deemed sufficient, in *Escue* v. *Nichols*,[7] on application made by the defendant under a special appearance, to require the court to vacate the default judgment it had entered, despite the fact that the defendant did not, in positive fashion, charge that service had not actually occurred. Had service in fact been made, so that jurisdiction could attach, an amendment to the return would have been highly proper as there is ample authority in Illinois to support an order permitting an amendment designed to vindicate that jurisdiction.[8]

Service of process may, of course, be waived for jurisdiction may be gained by the voluntary submission of the defendant as evidenced by his appearance in the cause. Common law technicalities regulating the use of a special appearance, designed to make it clear that there was no intention to submit to jurisdiction, often resulted in producing a result opposite to that desired, particularly when the special appearance was made by an attorney rather than by the litigant in his own proper person.[9] A 1945 amendment to Section 20 of the Civil Practice Act[10] declared that a special appearance, whether made in person or by attorney should not be deemed to be a general appearance. The trial court, in *Gleiser* v. *Gleiser*,[11] appears to have overlooked the amended provision when it held that a petition to vacate a decree for divorce, void for lack of jurisdiction insofar as it ordered the payment of alimony and attorney's fees, filed by a non-resident defendant through local counsel amounted to a submission to jurisdiction. The Supreme Court, acting because a violation of constitutional right had occurred, promptly reversed the holding.

The pleader should, of course, be conscious of the fact that the action he contemplates bringing should be promptly brought to avoid the possibility of it being barred by limitation. A minor point in that regard is to be found in the case of *Holmes* v.

7 335 Ill. App. 244, 81 N. E. (2d) 652 (1948).
8 Spellmyer v. Gaff, 112 Ill. 29, 1 N. E. 170 (1884).
9 Pratt v. Harris, 295 Ill. 504, 129 N. E. 277 (1920).
10 Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 144.
11 402 Ill. 343, 83 N. E. (2d) 693 (1949).

Brickey[12] where interpretation was given to the statutory provision limiting suits by the loser to recover money or property lost in gambling transactions to a period of six months.[13] The action there filed was begun one day over the six-month period following the gambling game but one day under a six-month period calculated from the time of payment. The Appellate Court held that, as no cause of action had accrued until the money was paid, the suit was timely enough to warrant denying a motion to dismiss based on a claim that the suit was barred.[14]

Of considerably greater importance is the problem of limitation involved in the case of *Wilson* v. *Tromly*,[15] one so rare that the court said it was unable to find a precedent anywhere in the United States. It appeared therein that two persons were involved in an automobile collision with such disastrous consequences that both died on the day of the date thereof. The representative of one of the decedents instituted a suit for the alleged wrongful death three days before the expiration of the one-year period fixed by the Injuries Act[16] and obtained service of process on the representative of the other deceased just one day before the expiration of such period. The defendant, within the time fixed by law for the filing of an answer but beyond the one-year period aforesaid, filed an answer denying negligence on the part of his decedent and accompanied the answer with a counterclaim for wrongful death on the part of plaintiff's intestate. A motion to dismiss the counterclaim on the ground that it was filed too late was sustained by the trial court and that action was affirmed on appeal. It was admitted by defendant that a separate suit would have been barred beyond question, just as would be the case had an attempt been made to introduce the cause by a belated amendment to the answer,[17] but de-

[12] 335 Ill. App. 390, 82 N. E. (2d) 200 (1948), noted in 27 CHICAGO-KENT LAW REVIEW 181.

[13] Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 330.

[14] Use of such a motion is authorized by Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 172(f).

[15] 336 Ill. App. 403, 84 N. E. (2d) 177 (1949). It is understood that, on leave to appeal, the Illinois Supreme Court, not in the period of this survey, affirmed the judgment therein: 404 Ill. 307, 89 N. E. (2d) 22 (1949).

[16] Ill. Rev. Stat. 1949, Vol. 1, Ch. 70, § 1 et seq.

[17] See Fitzpatrick v. Pitcairn, 371 Ill. 203, 20 N. E. (2d) 280 (1939).

fendant did assert that, as the counterclaim had been filed in apt time with reference to plaintiff's suit, the cause of action was saved by reason of Section 19 of the Limitation Act.[18] The Appellate Court, impressed by the fact that the one-year period fixed by the Injuries Act is not merely a period of limitation but is primarily a condition precedent to the enforcement of liability,[19] held the saving provision of the Limitation Act inapplicable to wrongful death cases whether begun as original suits or offered by way of counterclaim.

Choice of an appropriate remedy is also important. While no new issues have been raised concerning law actions, some points have been made over suits of equitable character. Because the original and basic function of equity had been to provide a remedy where relief at law was not plain or adequate, the situation disclosed in *Serafin* v. *Reid*,[20] when superficially examined, seemed to call for equitable action. The plaintiff there alleged that, in consideration of her forbearance from instituting bastardy proceedings, the defendant had agreed to pay plaintiff a weekly sum for the support and maintenance of the illegitimate child for a stipulated period but that defendant had refused to live up to the contract. Special ground for equitable intervention was laid on the basis that the filing of many expensive separate suits at law would become necessary to collect the successive installments as they matured, for defendant had repudiated his promise in its entirety. The defendant answered admitting paternity but claimed the agreement had been obtained by duress. The trial court, finding all issues in favor of the plaintiff, enjoined the defendant from breaching the terms of the contract. The Appellate Court, however, reversed because the ultimate relief sought by plaintiff was a monetary judgment. It said there was no need for equitable intervention because issues concerning the validity of the contract could be equally well settled at

[18] Ill. Rev. Stat. 1949, Vol. 2, Ch. 83, § 20. That statute extends an ordinary period of limitation by so much as an additional nine months after the date of the appointment of a legal representative for a deceased injured person.

[19] Bishop v. Chicago Railways Co., 303 Ill. 273, 135 N. E. 439 (1922).

[20] 335 Ill. App. 512, 82 N. E. (2d) 381 (1948), noted in 27 CHICAGO-KENT LAW REVIEW 179.

law where the determination would become binding on the parties by reason of the principle of *res judicata.* Without prior recourse to legal proceedings, the court said plaintiff would be lacking foundation for any claim that defendant was insolvent or was vexatiously persisting in his breach of contract and, absent these, there was nothing to show any inadequacy in a suit at law.

Although the Appellate Court failed to see any inadequacy of legal relief in the child-support case just mentioned, the Illinois Supreme Court had no trouble finding jurisdiction, in *Wiley* v. *Lamprecht,*[21] for a court of equity to act to restrain interference with the enjoyment of an alleged easement, even though that easement had not been established at law. The court did say that the right to the easement had to be clear and certain and that the threatened interruption thereof had to be injurious, but a person comparing the two cases is likely to be struck with the thought that property rights would appear to have been favored over human needs.

Where jurisdiction exists, equity has generally sought to model its decrees according to the needs of the parties and with an eye to that which would be appropriate considering the nature of the case. In matters of encroachment upon the land of a neighbor, it has always weighed the extent of the encroachment, the cost of removal, the resulting benefit to the adjoining owner, the wilfulness of the invasion, and other factors in an attempt to balance the equities between the parties. Two cases arising in the past year serve to exemplify these points. In *LaCost* v. *Mailloux,*[22] a concrete walk admittedly encroached a few inches upon, but did not interfere with the use of, the adjoining premises. A decree ordering the installation of a brass plate in the walk to mark the true boundary line was affirmed when it appeared that removal of the walk would serve no useful purpose and that action had been taken only to avoid the danger of loss of title by prescription. On the other hand, in the case

21 400 Ill. 587, 81 N. E. (2d) 459 (1948).
22 401 Ill. 283, 81 N. E. (2d) 920 (1948).

of *Nitterauer* v. *Pulley*,[23] the Supreme Court reversed the decree and ordered the issuance of a mandatory injunction requiring the removal of a garage which encroached to the extent of three feet upon the adjoining lot, despite a claim by defendants that they honestly believed they had built on their own land, when it appeared that defendants did not know where the property line ran and took no steps to ascertain its location before proceeding with the work.

Equity will not act to restrain the legislative acts of legally constituted law-making bodies, at least prior to the time when the legislative function has been exercised and attempts are made to carry the product thereof into operation. For that reason, the Appellate Court, in *Sparling* v. *Reich*,[24] after reviewing all pertinent decisions in Illinois, there denied the right of the plaintiff, a taxpayer, to obtain equitable interference with consideration and adoption of an ordinance by a village council.

Cases concerning reformation or rescission in land contract matters are considered elsewhere,[25] but one equitable lien case might be discussed at this point. In *Watson* v. *Hobson*,[26] the Supreme Court had an opportunity to deal with the principles governing such liens in a case where, by oral contract, certain property owners agreed that the debts owed by them for attorney's fees and other services, matters which had no connection with the real property, should be a lien thereon and on the rental income until such debts were paid. The court noted that an equitable lien is "neither a debt nor a right of property but a remedy for a debt," being a right of special nature over property amounting to a charge or encumbrance thereon, so that the very

23 401 Ill. 494, 82 N. E. (2d) 643 (1948).

24 336 Ill. App. 576, 84 N. E. (2d) 879 (1949).

25 Cases concerning reformation or rescission in land contract matters are considered under the heading of Real and Personal Property, post. It might be appropriate to note here that statutory proceedings for the partition of land, long regulated by an act first adopted in 1874, are now to be conducted pursuant to a new statute enacted during the period of this survey. See Laws 1949, p. 1182 et seq., S. B. 183; Ill. Rev. Stat. 1949, Vol. 2, Ch. 106, § 44 et seq. The new law represents a substantial recodification of the former one, the principal change being in the deletion of the special practice provisions which formerly controlled and the replacement thereof by a clause assimilating the practice in partition proceedings to that followed in other civil actions.

26 401 Ill. 191, 81 N. E. (2d) 885 (1948).

property itself might be proceeded against. Express executory instruments in writing indicating an intention to make a particular piece of property stand as security for a debt may be given effect, but the contract in the instant case being simply an oral one no equitable lien was created. The court was helped, in reaching that decision, by the fact that there was no relation between the particular piece of property and the services alleged to have been performed by plaintiff.

PREPARATION OF PLEADINGS

A pleader must, as he approaches the task of drafting the pleadings, give consideration to matters concerning proper parties to the litigation, for none without right should be permitted to sue and none but wrongdoers should be charged as defendants. Two points have been made over issues relating to proper parties. The codification into Section 23 of the Civil Practice Act[27] of the prior equity rule, one which permitted the bringing in as defendant of one who should be a necessary party plaintiff but who had refused to permit the use of his name, was intended to extend the beneficial effects thereof to law actions.[28] An attempt was made, in *Board of Education* v. *City of Chicago*,[29] to extend this view to a case where a board of education sought to condemn land for school purposes and named its own board of trustees as a defendant since it had not, on request, instituted suit as plaintiff. The majority of the court, taking the position that the sole and only proper party plaintiff was the board of trustees, said that, if recourse were had to the section in question to permit a stranger to begin the suit by naming the only proper party plaintiff as a defendant, the result would be to "inaugurate a form of litigation which would know no bounds." The section was held to be restricted to cases of joint parties where one or more refused to join in the action.

27 Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 147.

28 See Ill. Civ. Prac. Act Anno., 1933, p. 46.

29 402 Ill. 291, 83 N. E. (2d) 714 (1949). Crampton, J., wrote a dissenting opinion based on the premise that the plaintiff was the real party in interest and the proper one to bring the action.

Courts in Illinois appear to be falling into the habit of allowing what is essentially the establishment of a system of third-party practice despite the fact that there is no clear authority to warrant such action. While Section 25 of the Civil Practice Act[30] purports to authorize the bringing in of new parties "where a complete determination of the controversy cannot be had," it was the thought underlying that section to codify what had been the equitable rule on the subject rather than the common law rule, one which required the dismissal of the suit when indispensable or necessary parties had been omitted.[31] By permitting the addition of the required new parties through the issuance of a supplemental summons, the statute saved the *plaintiff* from the added expense of beginning a new proceeding. It can hardly be said to be authority for the practice of allowing a *defendant* to bring in someone who owes a cross-liability to him for the Illinois provision was modeled on Section 193 of the New York Civil Practice Act, one which is subtitled "Indispensable and conditionally necessary parties."[32] Sanction for true third-party practice in that state rests upon an entirely different section of the New York Act, one adopted in 1946, long after the enactment of the Illinois statute and not reproduced therein.[33] Any authority for such procedure in cases instituted in the Municipal Court of the City of Chicago[34] rests upon a rule peculiar to that tribunal[35] and care should be taken to see to it that no reliance is placed thereon in matters falling within the cognizance of other courts of record. If the adoption of a system of third-party practice is a desirable end, it should be accomplished by statutory addition or by rule of court and not through an unwitting tolerance in long-continued error.

30 Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 149.

31 See Ill. Civ. Prac. Anno., 1933, pp. 51-2.

32 Clevenger, Practice Manual 1949 (Baker, Voorhis & Co., Inc., New York, 1949), p. 3—14 et seq.

33 Ibid., p. 3—18 et seq.

34 See, for example, Hartford Accident & Indem. Co. v. Mutual Trucking Co., 337 Ill. App. 140, 85 N. E. (2d) 349 (1949).

35 Rule 25, Rules of Municipal Court of Chicago, Municipal Court Manual, 1950, p. 29. The rule is modelled on Rule 14 of the Rules of Civil Procedure for the District Courts of the United States.

Little has been said regarding the formality required in setting forth the elements of a case or defense. The necessity for an allegation of plaintiff's freedom from contributory negligence in a suit based on negligence is so commonplace in Illinois that a pleader would have to be more than forgetful to overlook making such a statement when drafting a complaint. The case of *Prater* v. *Buell*,[36] however, adds to the pleader's burden by requiring an allegation of plaintiff's freedom from contributory wilful and wanton misconduct in all complaints charging that type of conduct to a defendant. The presence of contributory wilful and wanton misconduct on plaintiff's part has heretofore been held to establish a complete defense[37] on the theory, long adhered to in Illinois, that no person shall be permitted to profit from a wrong in which he has participated. The instant case now serves to fix the requirement not only as one of proper pleading but also as one controlling the burden of proof on the issue, for what one must plead one must also be prepared to prove.

A typical allegation in a complaint based upon a contract makes reference to the consideration furnished in order to show that the agreement is an enforcible one. It was claimed, in the case of *In re Frayser's Estate*,[38] that the absence of such an allegation made the initial pleading filed therein fatally defective, particularly since the charge of lack of consideration set up in the answer had not been challenged by the reply and, therefore, stood admitted.[39] The pleader had, pursuant to statute,[40] attached a copy of the contract relied upon to the pleading as an exhibit. It contained the usual acknowledgment of the receipt of "$1.00 and other valuable consideration." Following the statutory direction that the exhibit should be considered "part of the pleading for all purposes," the Supreme Court said the language of the contract amounted to a sufficient averment of consideration so as to raise a triable issue. The phrase in question, however, comes

[36] 336 Ill. App. 533, 84 N. E. (2d) 676 (1949).
[37] Willgeroth v. Maddox, 281 Ill. App. 480 (1935).
[38] 401 Ill. 364, 82 N. E. (2d) 633 (1948).
[39] Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 164(2).
[40] Ibid., Ch. 110, § 160.

perilously close to a statement of conclusion,[41] so reliance on contractual verbiage to help out insufficiencies in a pleading may not always be wise.

A fundamental requirement of procedure demands that pleading, proof and judgment must coincide in order that a party be not permitted to charge one claim, prove another, and receive judgment on still a third.[42] An infraction of that requirement would seem to flow from the majority holding in *Central States Cooperatives, Inc.* v. *Watson Brothers Transportation Company, Inc.*,[43] where the court, impressed with the statutory command for liberality of construction in pleading,[44] seems to have accepted the view that all distinctions underlying the former actions have been swept away without observing the proviso that there has been no change in the substantial averments of fact necessary to state a cause of action.[45] The suit was begun, as in debt, to recover the statutory penalty for an alleged wrongful detention of realty after the expiration of a prior lease. Defendant, admitting use and occupation during the period in question, claimed the possession was lawful under an oral agreement to pay a specified rent which sum defendant tendered in open court. Plaintiff then applied for and received a partial judgment as upon admission[46] and had the court reserve jurisdiction as to the "balance of plaintiff's demand." The defendant appealed from the partial judgment on the ground that the admission was as to a case not charged by plaintiff, in fact one highly contradictory to the fundamental theory underlying the original complaint, hence it was improper to enter any judgment on the record then before the court. The objection was brushed aside with the remark that, the plaintiff's claim being for use and occupation, there could "be no

[41] In Central Security Co. v. Brewing Co., 166 Wis. 249, 164 N. W. 994 (1917), it was held that a pleading charging that a promise was made for a "valuable consideration" was fatally defective for failure to plead facts.

[42] Jackson v. Strong, 222 N. Y. 149, 118 N. E. 512 (1917). The court said that the rule of *secundum allegata et probata* is "fundamental in the administration of justice."

[43] 336 Ill. App. 314, 83 N. E. (2d) 752 (1949). Leave to appeal granted.

[44] Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 157.

[45] Ibid., Ch. 110, § 155.

[46] Ibid., Ch. 110, § 181.

escape from the liability of defendant to pay the admitted amount" no matter what the eventual determination might be as to the true basis of recovery. The dissenting opinion, to say the least, pays more attention to preserving the symmetry of procedural law and shows keener insight into the reasons for insisting why a plaintiff, having elected the theory on which he wishes to proceed, should be forced to abide by that theory and not be permitted to deviate therefrom. What may seem, at first sight, to be the doing of "substantial justice" could well develop into substantial injustice if a plaintiff, permitted to hale a defendant into court on one claim, is then permitted the right, without notice, to shift to another.

Some confusion as to the nature of a bill of particulars would appear to be present in the report of the case of *O'Brien* v. *Brown*[47] for the court there talked of it as a pleading which, not being evidence, could not go with the jury to the jury room but the contents of which, and the admissions predicated thereon, could be brought to the attention of the jury. That a bill of particulars is not a "pleading" in the ordinary sense of that term is borne out by the fact that, unlike an exhibit, essential allegations may not be left to be supplied thereby but must be made to appear in the complaint or counterclaim which it supplements.[48] The Civil Practice Act, however, does direct that, if a bill of particulars is demanded and the pleader files a sworn bill, the opponent must respond with an affidavit under oath specifically denying the items thereof or he will be deemed to have admitted the same.[49] It would be thought, by analogy to the situation presented when allegations in pleadings stand admitted for failure to deny,[50] that proof as to the non-disputed items would be unnecessary. The court, however, following the view of a Michigan case based on a comparable statute,[51] reached the conclusion that a failure

47 403 Ill. 183, 85 N. E. (2d) 685 (1949).

48 Dudley v. Duval, 29 Wash. 528, 70 P. 68 (1902), holds that a complaint cannot be enlarged or amended by a bill of particulars, although the latter may operate to restrict the proof which may be offered under the complaint.

49 Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 161(3).

50 Ibid., Ch. 110, § 164(2).

51 Cohen v. Peerless Soda Fountain Service Co., 257 Mich. 679, 241 N. W. 810 (1932). The case might be distinguishable on the basis that the bill there con-

to deny the specifications of a bill of particulars was not an admission thereof sufficient to obviate the necessity for proof.[52]

While a fair degree of liberality is shown in the provisions of the Civil Practice Act permitting amendments to be made to pleadings,[53] the case of *North Pier Terminal Company* v. *Hoskins Coal & Dock Corporation*[54] would indicate that there are limits to the privilege conferred thereby, particularly after judgment has been rendered in the trial court. Plaintiff there, as alleged successor to the next of kin of a deceased employee, sought to be reimbursed for sums compulsorily paid[55] growing out of the alleged wrongful death of the employee at the hands of the defendant. The complaint did not recite to whom such payment had been made nor did it allege that the decedent was survived by a widow, or children, or next of kin.[56] A verdict and judgment for plaintiff in the trial court was reversed by the Appellate Court on the ground that the complaint was fatally defective in this particular and the trial court was ordered to enter judgment for the defendant notwithstanding the verdict on the theory that defendant's motion to strike the complaint and dismiss the suit should have been sustained. Plaintiff sought further review before the Supreme Court on the ground that, by the remanding order, it had been foreclosed from its right to amend the complaint to cure the defect and, by reason of the one-year limitation provision on wrongful death cases, could not seek other relief by commencing another suit. The Supreme Court, however,

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cerned set forth varied demands for the "reasonable" value alleged to be due for services rendered and the court held that proof as to value was necessary, the amount not being admitted by the failure to file a denial. As to admissions of allegations of damages, see Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 164(2).

52 The court did reverse, however, to permit the taking of proof, because of error on the part of the trial court in refusing to allow the party to offer any evidence on the point.

53 Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 170. But see Leffers v. Hayes, 327 Ill. App. 440, 64 N. E. (2d) 768 (1946), noted in 24 CHICAGO-KENT LAW REVIEW 262, as to the power of a reviewing court to permit amendment after an appeal has been taken.

54 402 Ill. 192, 83 N. E. (2d) 748 (1949), affirming 333 Ill. App. 440, 77 N. E. (2d) 546 (1948).

55 The obligation was said to grow out of the Longshoremen's Compensation Act, 33 U. S. C. A. §901 et seq.

56 The action under Ill. Rev. Stat. 1949, Vol. 1, Ch. 70, § 1, was originally designed to benefit such persons.

affirmed the action taken on the basis that any amendment of the pleadings should have occurred prior to final judgment in the trial court,[57] after which the record would have to stand unchanged unless the case should subsequently be remanded with direction to reopen the judgment and to grant a new trial. The wisdom underlying the practice of re-examining the pleadings shortly before judgment, in order to catch defects therein, is thus made apparent.

In that connection, the holding in *Bollaert* v. *Kankakee Tile & Brick Company*[58] provided warning to counsel that any amendment which might become necessary in the procedural record so as to furnish adequate basis for the support of a judgment had to be made prior to the time when notice of appeal was filed in the case. Upon the filing of such notice, the trial court lost jurisdiction to do any more than certify the record in the state in which it then stood. A logical application of that holding occurred in *Palefrone* v. *Shelton*[59] wherein the trial court, learning that the Appellate Court on oral argument had expressed doubt as to the finality of the order appealed from, proceeded to enter an amended judgment order designed to carry its original purpose into operation.[60] A certified copy of the expanded judgment order, offered to implement the appellate record, was rejected and the appeal ordered dismissed on the ground that all power to grant the amendment ceased with the filing of the notice of appeal.

THE TRIAL OF THE CASE

The argument over the right of a court of equity to appoint a special commissioner to hear a case and thereby perform services customarily rendered by a master in chancery, brought to the

[57] Section 46(3) of the Civil Practice Act, Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 170(3), was inapplicable as it was admitted that the purpose of the amendment was not one designed to make the pleadings conform to the proof.

[58] 317 Ill. App. 120, 45 N. E. (2d) 506 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 244.

[59] 337 Ill. App. 99, 85 N. E. (2d) 52 (1949), abst. opin. Leave to appeal denied.

[60] The initial judgment had been "in favor of the defendants against the plaintiffs on the verdict of the jury, the jury having found the defendants not guilty." After amendment, the judgment included the important phrase that "plaintiffs take nothing by their aforesaid action, but that the defendants go hence without day" and permitted the recovery of costs.

fore by the case of *Simpson* v. *Harrison*,[61] still continues unabated, if one may judge by the question presented in the case of *Price* v. *Seator*.[62] Hearing of a petition filed therein to determine the right to attorney's fees for services in a partition suit was delegated to a special commissioner appointed for the purpose. No objection was made to the order of appointment and reference, in fact the complaining party participated in the hearings held by the special commissioner, but special objection was made to the report on the ground that the judge had no jurisdiction to appoint the commissioner unless there was no qualified master in chancery empowered to act.[63] The objection was held groundless on the premise that, as the judge is not required to spread the reasons for the appointment of a special commissioner upon the records of the court, it was presumed that he had acted for a sufficient reason in making the appointment. The higher court, apparently with tongue in cheek, noted the "extreme improbability of the happening of the contingencies necessary to make lawful the appointment" of a special commissioner in a populous county such as Cook County, but failed to find any evidence in the record to rebut the presumption of regularity in the judicial act.

The right to an impartial trial having been constitutionally guaranteed,[64] the Illinois statute on change of venue provides a reasonably adequate method by which to effectuate that guarantee. When two or more plaintiffs or defendants are involved, the statute directs that no change of venue shall be granted unless the application is concurred in by at least three-fourths of the affected parties.[65] A question arose, in *Cory Corporation* v. *Fitzgerald*,[66] as to whether it was proper, for purpose of this statute, to count those who were named as defendants but who had not been served with summons or who had not entered a voluntary appearance.

[61] 328 Ill. App. 425, 66 N. E. (2d) 494 (1946), noted in 25 CHICAGO-KENT LAW REVIEW 32-3.

[62] 337 Ill. App. 248, 85 N. E. (2d) 848 (1949). Leave to appeal denied.

[63] Ill. Rev. Stat. 1949, Vol. 2, Ch. 90, § 5.

[64] Ill. Const. 1870, Art. II, § 5.

[65] Ill. Rev. Stat. 1949, Vol. 2, Ch. 146, § 9.

[66] 335 Ill. App. 579, 82 N. E. (2d) 485 (1948). Niemeyer, J., wrote a dissenting opinion. Further appeal was dismissed, 403 Ill. 409, 86 N. E. (2d) 363 (1949), for lack of a final appealable order.

The majority of the Appellate Court for the First District, following a view expressed as to an earlier statute,[67] came to the conclusion that liberality of construction required a holding that only those should be counted over whom the court had obtained jurisdiction. Punishment for contempt for violation of a temporary injunction was there reversed because the chancellor had erroneously rejected a petition for change of venue, predicated on the ground of prejudice on the part of the judge, on the assumption that an insufficient percentage of the defendants had joined in the request. The court also noted that the proceeding being one designed to punish merely for civil, as contrasted with criminal, contempt of court, it was proper to petition for a change of venue therein.

It appearing that a trial will become necessary, the litigant will be concerned with assembling the evidence necessary to support his case or defense advanced by his pleadings. In that regard, he may wish to consider utilizing the procedure established by Rule 17 of the Supreme Court[68] to obtain sworn lists of documents, photographs, letters, and the like, which are or have been in the possession of the opposite party and which may be material to the merits of the case. That rule, however, contains an exception to the effect that the rule "shall not apply to memoranda, reports or documents" complied by or for either party in preparation for trial, nor to "any communication between any party or his agents and the attorney for such party." Interpretation and amplification of that rule was provided by the Supreme Court in the case of *Yowell* v. *Hunter*.[69] A will there involved was contested on the ground of forgery. On pre-trial conference, the trial court limited the number of expert witnesses who might testify but neither party was required to disclose the names of such experts. The expert witnesses, over objection, were permitted to use photographs taken in preparation for the trial, albeit the same had not been listed according to Rule 17. It was said that no error had occurred as the photographs fell within the exception above noted, even though the term "photograph" does not appear

[67] See Stauber v. Stauber, 200 Ill. App. 137 (1916).
[68] Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 259.17.
[69] 403 Ill. 202, 85 N. E. (2d) 674 (1949).

therein. The court also held that it was not error to refuse to require a party to divulge the name of his experts in advance of trial,[70] for which reason it would be wrong to permit a litigant to indirectly obtain the names of such experts by requiring the production of the materials which they had prepared.

Little has been said by the courts about the rules of evidence as they operate to regulate the admission or exclusion of proof, but *Aldridge* v. *Morris*[71] should receive the attention of trial attorneys engaged in personal injury litigation. The Appellate Court there held it proper to receive proof of the giving of a covenant not to sue to one of two joint tort-feasors, as well as testimony as to the amount of the consideration paid for such covenant, and that whether the covenantee had or had not been made a party to the suit. The court there also stated that it would be proper to "submit not only evidence of such payment, but instructions informing the jury of their right to consider such payment in arriving at their verdict."[72] Uncertainty produced by prior conflicting decisions on the point should be resolved by this well-considered decision, particularly if the same should be approved by the Supreme Court.

The legislature has provided some assistance, however, by enacting a provision that "microphotographs of business records may be admitted" under the statute providing for proof of book accounts,[73] both before courts and administrative agencies, so long as the reproductions conform to the minimum standards fixed by the National Bureau of Standards. The unhappy experience of banks and other businesses who had made "recordaks" of documents and other records only to find the same inadmissible because they were not originals may have caused the legislature to bring the statute into closer harmony with common business practice. At the same time, the legislature forbade the use, in civil suits, of accident reports required of owners of aircraft

70 See Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 259.23A.

71 337 Ill. App. 369, 86 N. E. (2d) 143 (1949), noted in 27 CHICAGO-KENT LAW REVIEW 313. Leave to appeal denied.

72 See also Restatement, Torts, § 885.

73 Laws 1949, p. 919, S. B. 631; Ill. Rev. Stat. 1949, Vol. 1, Ch. 51, § 3.

whose equipment becomes involved in injury or damage to persons or property.[74]

DAMAGES

Elements of damage law were concerned in a few noteworthy cases. Attention was directed last year to the Appellate Court decision in *Howlett* v. *McGarvey*[75] wherein the court held that a non-dependent relative could not claim a right to recover, under the Dram Shop Act, on the theory of a pecuniary injury to "property" for a death caused by an intoxicated automobile driver. The Supreme Court, on leave to appeal, affirmed the holding therein on the basis that the phrase "pecuniary injury," as used in the Wrongful Death Act, referred to the measure of damage and was not synonymous with similar language in the Dram Shop Act.[76]

The plaintiff did succeed, however, in two other cases. In the first, that of *Stephens* v. *Weigel*,[77] a husband and father was granted recognition of his claim to loss of consortium and for money advanced for hospital and medical expenses against the driver of the automobile in which his wife and daughter were riding on the theory that the wilful and wanton misconduct of the driver removed the case from under the so-called "guest" statute,[78] thereby saving the derivative action of the husband and parent. In the other, that of *Burnett* v. *Nolen*,[79] an automobile dealer was allowed to recover a sum stipulated to be "liquidated" damages from a purchaser who resold a car in violation of a covenant not to make a resale within ninety days from the date of purchase. While restrictions on resale are not favored and liquidated damage provisions are apt to be designated as forfeiture clauses, the court felt that the provision was a reasonable one in the light of the then current automobile shortage and was consonant with a public policy directed against "gray market"

74 Laws 1949, p. 429, S. B. 530; Ill. Rev. Stat. 1949, Vol. 1, Ch. 15½, § 22.42g.

75 334 Ill. App. 512, 79 N. E. (2d) 864 (1948), noted in 27 CHICAGO-KENT LAW REVIEW 42.

76 See Howlett v. Daglio, 402 Ill. 311, 83 N. E. (2d) 708 (1949).

77 336 Ill. App. 36, 82 N. E. (2d) 697 (1948).

78 Ill. Rev. Stat. 1949, Vol. 2, Ch. 95½, § 58a.

79 336 Ill. App. 376, 84 N. E. (2d) 155 (1949).

operations. Difficulty in establishing actual damage was deemed sufficient justification for a private agreement on the subject.

By far the most noteworthy case is that of *Aldridge* v. *Morris*[80] wherein the Appellate Court for the Second District dealt with the question whether payments made by one tort feasor for a covenant not to sue might be considered in mitigation of damage assessable against another tort feasor involved in the same wrong. It is impossible to reconcile, or to bring into harmony, the many prior Illinois cases bearing on the point, but the opinion in the instant case is a powerful argument in favor of the view that such payments are an element to be considered in determining the amount of recovery and that whether the payment is made before or after judgment or whether the covenantee is a party to the suit or not. It can only be hoped that the decision will serve to clarify the rule in Illinois and not become just another case in a long trail of confusion.

Two statutory changes have been made in this field. Recovery under the Wrongful Death Act may now be had by certain enumerated persons, not previously eligible as they did not fall into the category of widow or next of kin, provided no close relative survives the decedent. Only those elements of damage named in the amended statute can inure to the benefit of such persons.[81] A top limit of $15,000 has also been placed on claims arising under the Dram Shop Act[82] but it is uncertain whether the sum mentioned is intended to cover maximum liability for all persons harmed in the one occurrence or is a ceiling with respect to recovery by each one. Any statement of the legislative intent concerning the point would be mere surmise, so the problem must be left to the courts to settle the question.[83]

[80] 337 Ill. App. 369, 86 N. E. (2d) 143 (1949), noted in 27 CHICAGO-KENT LAW REVIEW 313. Leave to appeal denied.

[81] Laws 1949, p. 1029, H. B. 566; Ill. Rev. Stat. 1949, Vol. 1, Ch. 70, § 2.

[82] Laws 1949, p. 816, H. B. 957; Ill. Rev. Stat. 1949, Vol. 1, Ch. 43, § 135.

[83] A vexing problem concerning the applicable period of limitation to dram shop actions has, at least, been settled. If treated as suits based on a statute, the five-year period fixed by Ill. Rev. Stat. 1949, Vol. 2, Ch. 83, § 16, might have controlled. See O'Leary v. Frisbey, 17 Ill. App. 563 (1885). If, on the other hand, such actions were essentially suits for wrongful death or personal injury, a shorter period would be applied. The legislature has now made specific provision for a two-year limitation: Laws 1949, p. 816, H. B. 957; Ill. Rev. Stat. 1949, Vol. 1, Ch. 43, § 135.

APPEAL AND APPELLATE PROCEDURE.

A degree of appellate review of trial court judgments is possible, in the trial court itself, through use of a motion in the nature of a writ of error *coram nobis* filed pursuant to Section 72 of the Civil Practice Act.[84] The extent thereof would seem to be limited, however, not only by controlling common law principles[85] but also by the nature of the proceeding in which the attempted use is had, judging by the holding in *Department of Public Works and Buildings* v. *O'Brien*.[86] It was there decided that use of a motion in the nature of a writ of error *coram nobis* was improper in a condemnation proceeding since that motion is available for use only in cases prosecuted according to the course of the common law. Although other statutory types of proceedings have been modified so as to bring the procedure therein into conformity with that applicable to ordinary law cases,[87] no such provision appears in the Eminent Domain Act.[88] That statute being silent concerning the way by which relief may be obtained where a trial judge has entered an order because of error of fact, it can only be supposed that, under the present state of the law, such error must go uncured for want of an appropriate means to bring the matter to the attention of the court.[89]

True appellate review is possible only if all conditions precedent thereto have been met, otherwise the appeal will be dismissed.

84 Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 196.

85 Compare Gustafson v. Lundquist, 334 Ill. App. 287, 79 N. E. (2d) 306 (1948), with Bishopp v. Risser, 334 Ill. App. 522, 79 N. E. (2d) 835 (1948).

86 402 Ill. 89, 83 N. E. (2d) 280 (1949).

87 See, for example, Ill. Rev. Stat. 1949, Vol. 1, Ch. 57, § 11, as to forcible entry and detainer suits, and ibid., Vol. 2, Ch. 106, § 43, as to partition cases.

88 Ibid., Ch. 47, § 1 et seq.

89 The Eminent Domain Act, Ill. Rev. Stat. 1949, Vol. 1, Ch. 47, § 12, does authorize an appeal "as in other civil cases," but such appeal could hardly serve the purpose as the error would not appear on the face of the record. The dissenting opinion of Crampton, J., in Board of Education v. City of Chicago, 402 Ill. 291, 83 N. E. (2d) 714 (1949), would seem to suggest that Rule 2 of the Illinois Supreme Court, Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 259.2, assimilates the Civil Practice Act provisions to cases falling under the Eminent Domain Act, despite section 1 of the former statute which excludes condemnation cases from its operation, on the ground that issues of procedure not specifically regulated by the special act are matters cognizable under the general law. It is worthy of note, however, that this idea does not seem to have come to his mind when he wrote the opinion in the instant case.

Time, for example, is of unquestioned essence in connection with appeals from judgments in forcible detainer actions for the statute permits review only if the appeal is taken within five days.[90] It is not always clear, however, according to the holding in *Atlas Finishing Company* v. *Anderson*,[91] whether the five-day period is to be measured from the date of the original judgment or from the date of disposition of a motion directed against the judgment. The defendant there had presented a written motion to vacate the judgment for possession and to grant a new trial and, upon denial thereof, promptly took an appeal. It happened that more than five days had elapsed between the original judgment and the order disposing of the motion, so a majority of the judges of the Appellate Court for the First District ordered the appeal dismissed, regarding the motion as not being one to vacate the judgment but rather, as defendant had labelled it, a motion for a new trial which was insufficient to stay the running of the five-day period. A dissenting opinion therein, one which emphasizes the character of rather than the title given to the defendant's motion, would seem to be more in harmony with the spirit of the Civil Practice Act.

In much the same way, interlocutory orders may be reviewed only provided they fall within the category of appealable orders. The statute which authorizes appeal from certain of these interlocutory orders[92] must, according to the holding in *Kimbrough* v. *Parker*,[93] be read in conjunction with Rule 31 of the Illinois Supreme Court.[94] The appellant there concerned had his appeal dismissed because no motion had been made in the trial court to vacate an ex parte order granting the issuance of a temporary injunction, although use of such motion is expressly commanded by the rule referred to. An attempt to avoid the application of

90 Ill. Rev. Stat. 1949, Vol. 1, Ch. 57, § 19. It might be noted, at this point, that the legislature amended Section 20 of that statute at its last session so as to require that the appeal bond filed by the tenant shall be conditioned to guarantee the payment of all rent, due or to become due, regardless of the outcome of the appeal: Laws 1949, p. 961, S. B. 291; Ill. Rev. Stat. 1949, Vol. 1, Ch. 57, § 20.

91 336 Ill. App. 167, 83 N. E. (2d) 177 (1949), noted in 27 CHICAGO-KENT LAW REVIEW 251. Niemeyer, J., wrote a dissenting opinion.

92 Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 202.

93 336 Ill. App. 124, 83 N. E. (2d) 42 (1948).

94 Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 259.31.

the rule on the ground that, since notice of intention to apply for a temporary injunction had been given, the matter had not proceeded in true *ex parte* fashion was answered by pointing out that the term applies alike to cases where (1) no notice is given, or (2) where no response is made to a proper notice.[95]

Relief by way of appeal is generally limited to cases where the litigation in the trial court has progressed to the point where a "final" order has been obtained. An appeal prior to that point, except where expressly authorized by statute,[96] is usually deemed premature and will be dismissed on motion or even at the instance of the reviewing court in the absence of a motion to dismiss. There is no little confusion as to what constitutes a "final" order,[97] but even worse confusion has been generated, in cases based on two or more counts, because of the presence of a statute which permits more than one judgment in a cause,[98] for trial court action on one count may well precede action on the other. The force of this observation may be seen in the case of *Roddy* v. *Armitage-Hamlin Corporation*[99] where a plaintiff, minority shareholder in a corporation, filed a two-count complaint by which he sought (1) to obtain the advantage of his position as a dissenting shareholder under Section 72 of the Business Corporation Act,[1] and (2) to secure the annulment of a lease made by his corporation on the ground the same had been obtained by fraud. The first count was dismissed on motion but the trial court retained jurisdiction as to the second. An appeal from the order dismissing the first count was also, on motion, dismissed by the Appellate Court for lack of a final order. On leave to appeal to the Supreme Court, that court reversed and remanded with direction to hear the appeal on its merits on the ground the order dismissing count one of the complaint was a final adjudication as to the claims

[95] See City National Bank & Trust Co. v. Davis Hotel Corp., 280 Ill. App. 247 (1935).

[96] Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 202.

[97] Compare Brauer Machine & Supply Co. v. Parkhill Truck Co., 383 Ill. 569, 50 N. E. (2d) 836 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 207, with Gould v. Klabunde, 326 Ill. App. 643, 63 N. E. (2d) 258 (1945).

[98] Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 174.

[99] 401 Ill. 605, 83 N. E. (2d) 308 (1949).

[1] Ill. Rev. Stat. 1949, Vol. 1, Ch. 32, § 157.72.

advanced thereunder. The argument that only one cause in fact existed between plaintiff and defendant failed when the court noted that the claims advanced were based first, upon wrong done to plaintiff in his individual right, and second, to his corporation in whose behalf he sued in a representative capacity. The case confirms prior holdings as to the degree of finality present in an order dismissing a separable part of one controversy[2] and in dismissing a distinct but related claim in favor of the same plaintiff against the same defendant.[3]

The power of a reviewing court, after review, is generally confined to affirming, reversing, or reversing and remanding the case for further proceedings. In that regard, the unitary character of a common-law judgment against several defendants was such that if it became necessary to reverse the same, on appeal taken by one of the judgment debtors, it was necessary to reverse as to all. An enlightened view developed to the effect that the common-law rule tended to impede the practical administration of justice hence, whenever possible, a court was expected to reverse only as to the persons affected by the error, leaving the judgment to stand as to the rest. That view became codified in Section 92(e) of the Civil Practice Act[4] and was given application in the earlier case of *Minnis* v. *Friend,*[5] wherein the court treated a judgment against a number of tort feasors as being sufficiently divisible to permit a partial affirmance as to certain of the defendants but to be open to reversal as to others. It was urged in *Zahn* v. *Muscarello,*[6] that the "silent" treatment given to the holding in the Minnis case in the passing years was such as to warrant the assumption that the doctrine thereof had been nullified so as to require a restoration of the original conception aforementioned. The court, however, refused to agree that the Minnis

2 Hoier v. Kaplan, 313 Ill. 448, 145 N. E. 243 (1924).
3 Newberry Library v. Board of Education, 387 Ill. 85, 55 N. E. (2d) 147 (1944).
4 Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 216(e).
5 360 Ill. 328, 196 N. E. 191 (1935).
6 336 Ill. App. 188, 83 N. E. (2d) 504 (1948).

case had, in any way, lost its significance, pointing out that the interim cases relied on[7] were all distinguishable or fell within recognized exceptions to the more enlightened concept.[8]

Mention might also be made, at this point, of the fact that the legislature has directed that all appeals in cases involving the validity of county zoning ordinances or resolutions shall be taken to the Supreme Court,[9] thereby avoiding delay in obtaining review as well as eliminating the interposition of an extra appeal.

ENFORCEMENT OF JUDGMENTS

Only two cases of significance may be noted concerning the enforcibility of final judgments or legal processes designed to aid therein. It is familiar law that a writ of execution issued to enforce a law judgment becomes *functus officio* at the expiration of ninety days from its date[10] so that any act done in pursuance thereof subsequent to its expiration may well expose the public officer to liability for lack of valid authority to act. That doctrine was invoked by the plaintiff, in *Horner* v. *Bell,*[11] as sufficient reason to hold a sheriff liable for loss and damage done to personal property which he had removed from certain mortgaged premises under a writ of assistance issued to effectuate a foreclosure decree rendered in equity, but which writ had not been served until some six months after the date of its issue. The Appellate Court for the Third District, reversing a judgment in favor of the plaintiff, held the doctrine as to executions inapplicable for the reason that writs of assistance are issued under another statute which makes no provision for their expiration.[12] Such writs, the court said, would not expire until the command expressed therein had been fully obeyed.

[7] People v. Gentile Co-op Ass'n, 392 Ill. 393, 64 N. E. (2d) 907 (1946); Gray v. First Nat. Bank of Chicago, 388 Ill. 124, 57 N. E. (2d) 363 (1944); and Fredrich v. Wolf, 383 Ill. 638, 50 N. E. (2d) 755 (1943).

[8] It should be noted that the Civil Practice Act provision is applicable only to reviewing courts. No authority is given to a trial court to vacate a judgment in part but retain it in force as to other defendants: Brown v. Zaubawky, 388 Ill. 351, 57 N. E. (2d) 856 (1944).

[9] Laws 1949, p. 1197, H. B. 554; Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 199.

[10] Ill. Rev. Stat. 1949, Vol. 1, Ch. 77, § 8.

[11] 336 Ill. App. 581, 84 N. E. (2d) 672 (1949).

[12] Ill. Rev. Stat. 1949, Vol. 1, Ch. 22, § 42.

The much litigated case of *Roth* v. *Kaptowsky*[13] has finally resulted in a determination that Section 19 of the Garnishment Act[14] is broad enough to permit a court to enter a judgment in favor of a creditor against a garnishee under which monthly installments payable out of the proceeds of a life insurance option settlement may be appropriated, as the same mature, toward the payment of a judgment against the life insurance beneficiary. As a result of that decision, one said to be completely novel in the law of this state, new suits to reach the successive monthly payments as they become due are rendered unnecessary. The case affords a striking parallel to the doctrine of *Levinson* v. *Home Bank & Trust Company*[15] wherein the garnishee was permitted, under Section 13 of the Garnishment Act,[16] to set off all demands against the debtor whether the same were due at the time of garnishment or not. Logical extension of the instant case could carry the creditor's right over so as to reach the proceeds of other installment contracts.

One slight change has been made to the Attachment Act by the addition thereto of a section setting forth a preferred form of affidavit for attachment.[17] The section is permissive in character.

IV. CRIMINAL LAW AND PROCEDURE

There has been a scarcity of cases of any serious import in the field of substantive criminal law since the last issue of this survey, but a few new points have been made. In *People* v. *Wheeler*,[1] for example, the indictment contained two counts, one charging a fraudulent and felonious embezzlement and conversion of certain personal property which had been loaned to defendant, the other charging embezzlement of property which

[13] 401 Ill. 424, 82 N. E. (2d) 661 (1948), affirming 333 Ill. App. 112, 76 N. E. (2d) 786 (1948). See companion aspects of the case in 326 Ill. App. 415, 62 N. E. (2d) 17 (1945), reversed in 393 Ill. 484, 66 N. E. (2d) 664 (1946).

[14] Ill. Rev. Stat. 1949, Vol. 1, Ch. 62, § 19.

[15] 337 Ill. 241, 169 N. E. 193 (1929).

[16] Ill. Rev. Stat. 1949, Vol. 1, Ch. 62, § 13.

[17] Laws 1949, p. 322, H. B. 216; Ill. Rev. Stat. 1949, Vol. 1, Ch. 11, § 2a.

[1] 403 Ill. 78, 84 N. E. (2d) 832 (1949).